TUESDAY MORNING FEBRUARY 26, 2008

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read "Danger High Voltage."

Peter's pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter's father is contemplating filing a lawsuit on Peter's behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter's father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

Question 2

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

- 1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.
- 2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.

Question 3

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

- 1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.
- 2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

TUESDAY AFTERNOON

FEBRUARY 26, 2008

PERFORMANCE TEST A

INSTRUCTIONS AND FILE

ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

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ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

INSTRUCTIONS

- 1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
- 2. The problem is set in the fictional State of Columbia, one of the United States.
- 3. You will have two sets of materials with which to work: a File and a Library.
- 4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
- 5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
- 6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
- 7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
- 8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Engles, Clay & Medrano, LLP

10 Anderson Center Plainview, Columbia

MEMORANDUM

TO: Applicant FROM: Joan Clay

DATE: February 26, 2008

RE: One-Stop Equipment Leasing v. Frank Reeves

About three weeks ago we filed a malpractice action against a local attorney, Frank Reeves, on behalf of our client One-Stop Equipment Leasing, Inc. ("One-Stop"). David Matchie, the CEO and sole shareholder of One-Stop, came into our office last October with a box of files and materials he had obtained from Reeves when they parted company in November, 2006. Reeves had been One-Stop's attorney for about six years at that point, and he had managed to create quite a mess. Matchie asked us to go through the files and see if there were grounds for a malpractice action, and sure enough, there were. The problem was that Reeves had told Matchie not to bother with the "formalities" of filing the required annual statements and tax returns for the corporation, so at the time Matchie first contacted us, the corporation had been suspended and had no power to institute litigation. By the time we got those problems cleared up, about a month ago, the statute of limitations on some of the claims appeared to have run. We filed the claims anyway, after my preliminary research indicated the statute of limitations might not be a bar. As we expected, Reeves demurred to the complaint.

I need your help in drafting certain sections of our memorandum of points and authorities in opposition to the demurrer. I have attached for your reference our office guidelines for drafting Persuasive Briefs and Memoranda. Please draft those portions of the memorandum that persuasively argue that:

- 1. The Third Cause of Action was timely filed under the applicable statute of limitations;
- 2. The Fourth Cause of Action was timely filed under the applicable statute of limitations; and
- 3. The defendant should be equitably estopped from asserting the statute of limitations against all causes of action.

As you probably remember from law school, demurrers and responses to them can only rely on facts that are alleged in the complaint. I have included a couple of brief memos from the file to give you some background, but you should not refer in your draft to anything covered in those memos that is not also mentioned in the complaint.

Engles, Clay & Medrano, LLP

10 Anderson Center Plainview, Columbia

MEMORANDUM

TO: All Attorneys

FROM: Executive Committee

RE: Persuasive Briefs and Memoranda

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs, including briefs in support of motions (also called memoranda of points and authorities), whether directed to an appellate court, trial court, arbitration panel or administrative officer shall conform to the following guidelines.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION. **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, an index, or, unless specifically requested to do so, a statement of facts. These will be prepared, where required, after the draft is approved.

MEMORANDUM TO FILE

TO: File, One-Stop Equipment Leasing Matter

FROM: Joan Clay

DATE: October 8, 2007

RE: Summary of Client Interview

David Matchie, sole shareholder and officer of this Columbia corporation, came in to discuss filing a malpractice action against the corporation's former attorney, Frank Reeves. Matchie is a self-made businessman who worked his way up from operating heavy equipment to owning and leasing it, forming a corporation in the early 1990's. Reeves represented One-Stop in a variety of matters from sometime in 2000 until Matchie fired him on November 20, 2006, after he found out Reeves had been concealing the fact that he had allowed a default judgment to be entered against the corporation some two years earlier. Matchie demanded and obtained the files in all the matters Reeves had handled for One-Stop on that same day, November 20, 2006.

Matchie brought all these files to the interview in a large box, and also gave me a thick folder of delinquency notices and other communications from the Columbia authorities regarding the corporation's failure to pay taxes and file its required annual statements for the last few years. Matchie said Reeves had told him these corporate obligations were "mere formalities" that he could safely ignore, and that he could continue to carry on the corporation's business, including engaging in any necessary litigation, in his own name. I told him I didn't think that was the case, but would get back to him after doing some research. I also told him it would take a few days to go through the files and see if there was a viable malpractice action. We scheduled a follow-up appointment for next week.

MEMORANDUM TO FILE

TO: File, One-Stop Equipment Leasing Matter

FROM: Joan Clay

DATE: October 14, 2007

RE: Corporate Matters and Possible Malpractice Actions

1. Re: Corporate matters. A review of the documents brought in by David Matchie on behalf of the corporate client revealed that it has been suspended under both § 2205 of the Corporations Code and § 23301 of the Revenue and Taxation Code for failing to file its annual statements and pay its taxes from 2003 to the present. Until it applies for a certificate of revivor, files the statements, pays taxes, penalties and interest it can transact no business of any kind, including filing lawsuits or even defending any lawsuits that might be filed. I called the two offices that handle these matters in Columbia – the Secretary of State's office and the Tax Board – and learned that it will take at least three to six months to complete all the paperwork, and there is no way the process can be accelerated. They are sending a complete accounting of all the amounts due, and in our meeting yesterday Mr. Matchie retained us to straighten all this out for him and assured me he could pay our fees as well as the back taxes, penalties and interest. He gave me a \$10,000 retainer as a beginning.

2. Re: Possible malpractice actions. It is absolutely clear from my research that Matchie cannot prosecute the corporation's claims as an individual, so we will have to wait until the corporation is reinstated before filing a malpractice action against Frank Reeves. It looks like Reeves egregiously fouled up One-Stop's claim against Goodfellows Development Corporation and also the lawsuit by A.B. Construction against One-Stop. Reeves turned over all the files on both of these matters to Matchie on November 20, 2006. Thus, these claims were fully accrued and with reasonable

diligence Matchie or any lawyer for One-Stop could have discovered that the statute began to run on that date. The one-year statute of limitations expires next month, and it may be as much as six months before we can file. I think we should still file these actions when it becomes possible, arguing the statute should not be a bar, and there may be claims based on the grossly erroneous advice that put the client in this predicament.

Joan Allen Clay, State Bar #10239 Engles, Clay and Medrano, LLP 10 Anderson Center Plainview, Columbia Attorney for Plaintiff

FILED

Clerk, Fulton County Superior Court February 5, 2008

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, INC.	Case No. 320016
Plaintiff,	
V.	COMPLAINT FOR DAMAGES
	FOR PROFESSIONAL
	NEGLIGENCE AND FRAUD
FRANK REEVES, Attorney-at-Law,	
Defendant.	
Plaintiff alleges as follows:	

FIRST CAUSE OF ACTION

(Negligent Failure to Commence Action on Timely Basis)

- 1. Plaintiff One-Stop Equipment Leasing, Inc., is a Columbia corporation engaged in the business of equipment leasing and finance.
- 2. Defendant Frank Reeves resides in Fulton County, Columbia, and at all times herein mentioned was licensed to practice law in the State of Columbia and maintained a law office at 710 Main Street, Plainview, Columbia.
- 3. On or about March 12, 2000, plaintiff and defendant entered into a written retainer agreement under which defendant was retained by plaintiff to advise it on non-litigation matters and also to represent it in litigation matters on an ongoing basis. Defendant accepted such employment and commenced to handle all legal matters on which plaintiff needed assistance. This arrangement continued until November 20, 2006, when plaintiff terminated the agreement and obtained from defendant all files pertaining to matters in which defendant had advised and represented plaintiff.
- 4. In accordance with their retainer agreement, on or about June 25, 2003, plaintiff employed defendant to represent plaintiff in commencing and prosecuting a contract claim against Goodfellows Development Corporation. Defendant assured plaintiff that he was diligently prosecuting said claim.
- 5. In fact, defendant failed to exercise reasonable skill, care and diligence in representing plaintiff in said matter and negligently failed to commence such action within the three-year statute of limitations.
- 6. Plaintiff is informed and believes and on that basis alleges that such claim was at all times mentioned meritorious; that plaintiff would have recovered on such claim; and that at all times mentioned Goodfellows Development Corporation was solvent with sufficient assets and property to satisfy a judgment in the amount claimed.
- 7. As a proximate result of the negligence herein alleged, plaintiff's cause of action in this matter is now barred and its claim rendered worthless, all to plaintiff's damage.

SECOND CAUSE OF ACTION

(Negligent Failure to Defend Action)

- 8. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action.
- 9. In accordance with his retainer agreement with plaintiff, defendant was employed to defend plaintiff in an action filed in the Superior Court of Columbia, County of Fulton, entitled A.B. Construction vs. One-Stop Equipment Leasing. Plaintiff was identified as a defendant in said action, and defendant Reeves accepted service on plaintiff's behalf on January 17, 2005. Defendant accepted such service without notifying plaintiff and knew he was obligated to represent plaintiff in defending said action under the retainer agreement.
- 10. Defendant was very familiar with the subject matter of the above action and knew plaintiff had a meritorious and sufficient defense to the complaint. Had plaintiff been advised of the action, it was also available, willing and able to provide the facts comprising its defense from the time the complaint was filed until expiration of the time to file an answer or other responsive pleading.
- 11. Instead, defendant failed to exercise reasonable care and skill in representing plaintiff and in defending such action, and neglected to file an answer or any responsive pleading within the time required by law and negligently permitted a default judgment to be entered against plaintiff.
- 12. Plaintiff is informed and believes and on that basis alleges that if defendant had exercised due care and skill in representing plaintiff, judgment would have been entered in plaintiff's favor in such action.
- 13. As a proximate result of such negligence, a default judgment was entered against plaintiff on April 5, 2005 in the sum of \$37,698.00, as prayed for in such action.
- 14. Defendant concealed the entry of this default judgment against plaintiff, and as a result plaintiff was unable to obtain other counsel and seek to set aside the default

or obtain other relief, and also incurred further expense in the form of accrued interest amounting to \$4,435.00.

15. As a proximate result of defendant's negligence and subsequent concealment plaintiff has been damaged.

THIRD CAUSE OF ACTION

(Negligence in the Giving of Advice)

- 16. Plaintiff refers to and herein incorporates Paragraphs 1 through 3 of the First Cause of Action.
- 17. Beginning in February, 2004 and continuing until the termination of their attorney-client relationship on November 20, 2006, following a period in which lapses in record keeping and incomplete financial information caused plaintiff to be unable to file an accurate corporate tax return for the 2003 calendar year, defendant advised plaintiff not to file a return at all, because to do so would subject plaintiff to fines, and plaintiff's sole shareholder, officer and director, David Matchie, to both fines and imprisonment for filing false tax returns. Defendant further advised plaintiff that it need not observe any normal corporate formalities, including, among other things, maintaining corporate minutes or filing the statement of information required by Corporations Code section 1502. Defendant advised that the failure to observe these "mere formalities" would result in suspension of plaintiff's corporate status, but that its corporate status could be renewed by merely paying the back taxes at any time, without affecting any of plaintiff's business or legal claims. Defendant also advised that David Matchie could prosecute in his own name any legal claim plaintiff One-Stop might have. This advice was rendered periodically from February, 2004, when it was first given, until the parties terminated their relationship.
- 18. The advice specified above was erroneous, and in giving such advice defendant was negligent in that he failed to research the law or investigate the factual basis of his assertions, thus failing to exercise the degree of care, skill and diligence he owed to plaintiff.

- 19. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice. Plaintiff continued to rely on defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given.
- 20. As a proximate result of defendant's negligent advice, plaintiff was damaged as follows: First, plaintiff was suspended from doing business in Columbia and incurred fines and penalties as well as charges for accrued interest. Second, plaintiff also had to employ legal counsel to assist in undoing the harm caused by defendant's negligent and erroneous advice, and thereby incurred substantial legal fees. Third, as a result of its suspended corporate status, plaintiff was prevented from filing claims against defendant Reeves and other possible defendants within the time period specified by the applicable statutes of limitations, thereby jeopardizing and in some cases foreclosing plaintiff's ability to prosecute valid legal claims. Plaintiff continues to incur damages as a proximate result of defendant's negligence as alleged herein.

FOURTH CAUSE OF ACTION (Fraud)

- 21. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action, and Paragraph 17 and 20 of the Third Cause of Action, above.
- 22. By virtue of the attorney-client relationship that existed between defendant and plaintiff, defendant owed to plaintiff a fiduciary duty, and by virtue of plaintiff's having placed confidence in the fidelity and integrity of defendant and entrusting defendant to provide accurate, reliable advice on the conduct of plaintiff's corporate

affairs, a confidential relationship existed at all times herein mentioned between plaintiff and defendant.

- 23. Despite having voluntarily accepted the trust and confidence of plaintiff with regard to giving accurate and reliable advice on the conduct of plaintiff's corporate affairs, and in violation of this relationship of trust and confidence, defendant abused the trust and confidence by giving the patently erroneous advice summarized above.
- 24. Plaintiff in fact placed confidence and reliance in defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given. Plaintiff reasonably relied on the defendant because of their attorney-client relationship.
- 25. As a result of defendant's aforementioned breach of fiduciary duties to plaintiff, defendant gained a financial advantage in that from February, 2004 to November 20, 2006, plaintiff continued to employ defendant and pay his fees, and even after that continued to rely on his advice concerning the consequences of the course of action he had recommended. Furthermore, by giving advice that resulted in the suspension of plaintiff's corporate status, defendant prevented plaintiff from being able to prosecute its claims against defendant himself within the period specified by the applicable statute of limitations, which, unless remedied by this court, would also result in a substantial financial benefit to defendant.
- 26. Defendant knew that the advice summarized above was erroneous but repeated it on numerous occasions and also concealed from plaintiff the legal consequences of some of the actions it had taken in reliance on this advice as these consequences began to occur. Defendant did these acts with the intent to deceive and

defraud plaintiff, and with the intent to induce reliance by plaintiff in the continuing fidelity of its attorney.

- 27. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice.
- 28. As a proximate result of defendant's breach of his fiduciary duty to plaintiff by intentionally giving erroneous advice, plaintiff was damaged as set out in paragraph 20, referred to and incorporated above. Plaintiff continues to incur damages as a proximate result of defendant's fraudulent conduct as alleged herein.
- 29. In doing the acts alleged herein, defendant intentionally concealed the true and material facts known to defendant with the intention of thereby depriving plaintiff of property and legal rights, and plaintiff is entitled to punitive damages against defendant.

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION:

1. For compensatory damages in the amount of \$450,000;

ON THE SECOND CAUSE OF ACTION:

2. For compensatory damages in the amount of \$42,133;

ON THE THIRD CAUSE OF ACTION:

3. For compensatory damages in the amount of \$157,000 comprising penalties, interest, and attorneys' fees incurred to this date;

ON THE FOURTH CAUSE OF ACTION:

- 4. For the compensatory damages identified in the Third Cause of Action, above;
- 5. For punitive damages of \$1,000,000.

ON ALL CAUSES OF ACTION:

- 6. For costs of suit incurred herein; and
- 7. For such other and further relief as the court may deem proper.

Dated: February 5, 2008

Engles, Clay and Medrano, LLP

By: Joan Allen Clay

JOAN ALLEN CLAY
Attorney for Plaintiff

Lewis Farrington, State Bar #13465 Robey, Smith and Brown, LLP 712 Main Street Plainview, Columbia Attorney for Defendant

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, I	NC.	Case No.	320016
Plaintiff,			
	MEMOR	ANDUM OF PO	DINTS AND
V.	AUTHO	RITIES IN SUP	PORT OF
	DEMUR	RER OF DEFE	NDANT
	FRANK	REEVES TO C	OMPLAINT
FRANK REEVES, Attorney-at-Law,	OF PLA	INTIFF ONE-S	ТОР
	EQUIPM	IENT LEASING	i, INC.
Defendant.			
)			

Defendant demurs to plaintiff's complaint on the ground that it fails to state a cause of action in that it appears on the face of the complaint that each cause of action is barred by the applicable statute of limitations, in that the alleged wrongful acts and

omissions of which plaintiff complains were all discovered by plaintiff on or before November 20, 2006, and this action against defendant was not brought until February 5, 2008.

- **A. Objection by Demurrer.** The party against whom a complaint has been filed may object by demurrer, as provided in Section 430.30 of the Columbia Code of Civil Procedure, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). When any ground for objection to a complaint appears on the face thereof, that ground may be taken by a demurrer to the complaint or any of the separate claims therein. Code Civ. Proc. § 430.30(a).
- **B.** Raising Statute of Limitations by Demurrer. The objection that an action is barred by a statute of limitations may be set up by demurrer. *Krusesky v. Baugh* (Columbia Court of Appeals, 1982). This objection is deemed to be included in the general ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action. *Id.*
- **C.** Limitation on Commencement of Action. Civil actions, without exception, can be commenced only within the periods prescribed in Title 2 of Part 2 (Section 312 et seq.) of the Columbia Code of Civil Procedure, after the cause of action shall have accrued.
- **D.** Commencement of Action. An action is commenced, within the meaning of Title 2, Part 2, Section 312 et seq. of the Code of Civil Procedure when the complaint is filed. Code Civ. Proc. § 350.
- **E.** Accrual of Cause of Action. A cause of action invariably accrues when there is a remedy available. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (Columbia Supreme Court, 1998).

F. Period of Limitation. An action against an attorney for wrongful acts or

omissions arising in the performance of professional services shall be commenced

within one year after the plaintiff discovers, or through the use of reasonable diligence

should have discovered, the facts constituting the wrongful act or omission, or four

years from the date of the wrongful act or omission, whichever occurs first. Code Civ.

Proc. § 340.6.

G. Running of Period of Limitation. In this case, it is apparent on the face of

the complaint that plaintiff discovered the facts constituting the alleged wrongful acts

and omissions complained of on November 20, 2006. The applicable one-year period

of limitation began to run on that date and expired one year later, on November 20,

2007. Since plaintiff failed to file its complaint within that time period, its claims are

barred and the complaint must be dismissed.

WHEREFORE, defendant prays that his demurrer be sustained without leave to

amend, and that the complaint be dismissed.

Dated: February 21, 2008

Respectfully submitted,

Robey, Smith and Brown

By Lewis Farrington

LEWIS FARRINGTON

Attorney for Defendant

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TUESDAY AFTERNOON FEBRUARY 26, 2008

PERFORMANCE TEST A LIBRARY

ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

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COLUMBIA CODE OF CIVIL PROCEDURE

§ 335. Periods of limitation prescribed.

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

* * * * * * * *

§ 338. Statutory liability; injury to property; fraud or mistake; three years.

Within three years:

- (a) An action upon a liability created by statute, other than a penalty or forfeiture.
- (b) An action for trespass upon or injury to real property.
- (c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.
- (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

* * * * * * * *

§ 340.6. Action against attorney for wrongful act or omission, other than fraud.

- (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
- (1) The plaintiff has not sustained actual injury;
- (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
- (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation; or
- (4) The plaintiff is under a mental or physical disability which restricts the plaintiff's ability to commence legal action.

Krusesky v. Baugh

Columbia Court of Appeals (1982)

Plaintiff, Donna Krusesky, filed this action against her divorce lawyer, defendant Clyde A. Baugh, alleging that he negligently failed to tell her the military retirement benefits paid to her husband Alex at the time of their 1977 divorce were community property. The divorce ended a 23-year marriage during which Alex served continuously in the United States Navy. Donna alleges she remained unaware of her rights to the pension until February 25, 1980, when a lawyer she consulted on another matter pertaining to the divorce judgment advised her of her community property interest in the pension. Donna filed this suit for malpractice on November 3, 1980. Baugh successfully demurred on the ground Krusesky's action was barred by the statute of limitations, Code of Civil Procedure section 340.6.

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint, but also facts that may be inferred from those expressly alleged. A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint: it is not enough that the complaint shows that the action may be barred. We proceed on the premise that Donna states a valid cause of action for legal malpractice where the pension involved consists of federal retirement benefits which were both vested and matured at the time of the divorce.

The statute of limitations applicable to this action, Code of Civil Procedure section 340.6, provides that a legal malpractice case, other than one for actual fraud, "shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or

omission, or four years from the date of the wrongful act or omission, whichever occurs first...." Since Donna filed her action less than four years after her divorce became final, on September 23, 1977, she is not barred by the four-year occurrence rule of section 340.6.

There remains the question of whether Donna's action is barred by the one-year discovery rule of section 340.6. Donna alleges she did not discover she was entitled to share in her husband's military retirement pension benefits until February 25, 1980, less than one year before she filed her malpractice action against Baugh. Assuming this allegation to be true, Donna actually discovered the facts constituting Baugh's negligent act within the one-year period.

Whether Donna "through the use of reasonable diligence should have discovered" those facts more than one year before she filed her malpractice action depends on whether she had notice of circumstances sufficient to put a reasonable person on inquiry. What constitutes such notice turns on the facts of each case. In some cases, sustaining known physical or monetary damages may be a fact sufficient to alert a plaintiff to the necessity for investigation and pursuit of her remedies. In other cases, however, because of the nature of legal advice, a financial loss will pass unnoticed.

An attorney stands in a fiduciary relationship to his clients. A client damaged in the context of such a relationship is under no duty to investigate her attorney's actions unless she has actual notice of facts sufficient to arouse the suspicions of a reasonable person. In light of Baugh's advice, Donna's lack of suspicion about not receiving part of her husband's pension benefits is understandable and her delay until February 25, 1980, to investigate Baugh's competence was reasonable. To conclude otherwise and hold that Donna acted unreasonably would in effect require a client to consult a second lawyer in every case for another opinion on every subject. Because Donna filed her malpractice action within one year after her reasonable discovery of the facts

constituting Baugh's negligent act, she is not barred by the one-year limitations period of section 340.6.

The judgment is reversed.

Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison

Columbia Supreme Court (1998)

This case involves the question of when a plaintiff suffers "actual injury" within the meaning of Code of Civil Procedure section 340.6 (a)(1) so as to start the statute of limitations running in an action for attorney malpractice.

Jordache Enterprises, Inc. retained the law firm of Brobeck, Phleger & Harrison (Brobeck) in 1984 to defend it in a lawsuit filed in Los Angeles (the Marciano action). This action involved several claims, including that Jordache was marketing "knockoffs" of Guess?, Inc. apparel. Jordache did not request from Brobeck, and Brobeck did not offer, any advice concerning insurance coverage for the Marciano action. Brobeck did not ask about Jordache's insurance or otherwise investigate whether any potential for coverage might trigger an insurer's duty to defend the Marciano action.

In April, 1987, Reavis & Pogue replaced Brobeck as Jordache's counsel of record in the Marciano action. Its new counsel advised Jordache there was potential insurance coverage for that action. In August, 1987, Jordache instructed its counsel to demand that its insurers defend the Marciano action and the two related actions then pending in Delaware and Hong Kong. Counsel contacted Jordache's insurance broker, Advocate Brokerage Corp., and asked it to submit the claims to Jordache's insurers. In December, 1987, Jordache gave Reavis & Pogue "exclusive authority" to make and prosecute claims concerning the Marciano action against Jordache's liability insurers. From the outset, Jordache and its new counsel discussed the predicament in which Jordache found itself. A "big issue" in these early discussions was the probability that the insurers would raise a "late notice" defense to Jordache's coverage claim. Thus, by December, 1987, Jordache had discovered Brobeck's alleged negligence in not notifying or advising Jordache to notify its insurers of the Marciano action.

More than three years after the Marciano action began, Reavis & Pogue formally tendered defense of the action directly to Jordache's liability insurance carriers. Soon after, in February, 1988, Jordache sued its insurers, alleging they failed to provide a defense and wrongfully refused to acknowledge coverage. Jordache sought reimbursement for \$30 million it had allegedly paid for attorney fees and costs in the Marciano action. Jordache also asserted that it lost millions of dollars in profits because the funds spent on legal fees would otherwise have been used for profitable investments.

In May, 1990, the Marciano action settled. Jordache and one of its insurers then filed cross-motions for summary adjudication of issues in their insurance coverage litigation. After an adverse ruling on some of these issues, Jordache settled its insurance coverage suits for \$12.5 million on July 31, 1990.

Jordache's legal malpractice claim against Brobeck was filed on August 15, 1990, alleging only omissions: (1) failure to recognize that Jordache's insurance might cover the Marciano action; (2) failure to investigate or advise Jordache to investigate whether it did, and (3) failure to notify or to advise Jordache to notify its liability insurers whose policies potentially covered the action.

Brobeck moved for summary judgment, asserting that section 340.6 barred Jordache's claims because, no later than 1987, Jordache discovered the alleged omissions and sustained actual injury in the form of (1) lost profits from business investment monies diverted to defense costs in the Marciano action, and (2) forgone insurance benefits for defense costs incurred before Jordache tendered defense of the Marciano action. Jordache agreed that it discovered Brobeck's alleged omissions by December, 1987. Jordache opposed the motion on the ground that it did not sustain actual injury until it settled with its insurers for less than the full amount of its claim.

The trial court granted summary judgment, finding that more than one year before its suit was filed, Jordache sustained actual injury within the meaning of section 340.6 because it claimed it lost millions of dollars of business profits before it tendered the Marciano action's defense to its insurers. The Court of Appeals reversed, holding that Jordache suffered no actual injury within the meaning of section 340.6 until it settled its actions against the insurers in July, 1990. We granted Brobeck's petition for review on this single issue.

This court most recently considered the actual injury provision in *Adams v. Paul* (1995). *Adams* reconfirmed the following: (1) determining actual injury is predominantly a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount.

Ordinarily, the client already has suffered damage when it discovers the attorney's error. In this case, the client alleged its attorneys failed to advise it about, or to assert a timely claim to, liability insurance benefits covering a third party's suit against the client. The client acknowledged it discovered its attorneys' alleged malpractice more than one year before it commenced this action. However, the client also contends it did not sustain actual injury until it later settled its action against its insurer for less than the full benefits it claimed.

We conclude that actual injury occurred before the court's settlement with the insurer. In reaching this conclusion, we reaffirm the basic principles reiterated in *Adams*. Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions. Under section 340.6, subdivision (a)(1) will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.

Here, the attorneys' alleged neglect allowed the insurers to raise an objectively viable defense to coverage under the policies. The insurer's assertion of this defense necessarily increased the client's cost to litigate its coverage claims and reduced those claims' settlement value. Moreover, because of the attorneys' alleged neglect, the client provided its own defense in the third party action for several years. Consequently, this client not only lost a primary benefit of liability insurance, it also lost profitable alternative uses for the substantial sums it paid in defense costs. These detrimental effects of the attorneys' alleged neglect were not contingent on the outcome of the coverage action. Further, that action could not establish either a breach of duty to provide timely insurance advice or a causal relationship between the alleged neglect and the claimed damages. Instead, the coverage action settlement simply reflected the client's preexisting predicament – the attorneys' alleged omissions had diminished the client's rights to its liability insurance benefits.

The loss or diminution of a right or remedy constitutes injury or damage. Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. The coverage action settlement was not the first realization of injury from the alleged malpractice; the settlement simply resolved one alternative means to mitigate that injury. Accordingly, we agree with the trial court that the undisputed facts establish that the client sustained actual injury more than one year before it commenced this suit.

Reversed.

Battuello v. Battuello

Columbia Court of Appeals (1998)

Appellant Craig Batuello has, for many years, worked on the family vineyard located in the Grappa Valley. Ever since appellant was a young boy, his father, Dominic, and his mother, Ellen, told appellant repeatedly that they would give him the vineyard when Dominic died. In reliance on those promises, appellant went to college to learn the formal aspects of running a business; and from 1970 through 1995, appellant farmed and managed the vineyard.

In 1988, Dominic and Ellen executed a trust which specified that appellant would receive the vineyard upon the death of the survivor of Dominic and Ellen. Dominic died on December 10, 1995. Shortly thereafter, appellant learned that in 1994, Dominic and Ellen had executed another trust and related documents (the 1994 trust) which stated that appellant would not receive the vineyard as he had been promised.

Appellant objected when he learned the terms of the 1994 trust, and he entered into settlement negotiations with his mother and her legal advisors. As a result of these negotiations, Ellen promised appellant he would receive the vineyard no later than the end of 1996. In reliance on those promises, appellant refrained from making any objection when Ellen filed a petition in the Superior Court to confirm that the 1994 trust had title to the vineyard. In December, 1996 the court did, in fact, rule that the trust had title to the vineyard pursuant to the 1994 trust document.

Shortly thereafter, Ellen repudiated the settlement agreement, taking the position that appellant did not have any right to the vineyard other than that to which he might be entitled under the 1994 trust. Faced with this breach of the settlement agreement and the potential loss of the vineyard, appellant filed the present action against Ellen, both

individually and in her capacity as trustee of the trust, and against Dominic's estate, seeking to enforce his father's promise to give him the vineyard when he died.

Ellen, acting individually, as trustee of the trust, and apparently on behalf of Dominic's estate, demurred to the complaint on the grounds that the action was barred by the one-year statute of limitations set forth in Code of Civil Procedure section 366.2. The trial court agreed and sustained the demurrer without leave to amend. This appeal followed.

In the trial court, appellant argued that even if the statute of limitations set forth in section 366.2 applied, respondents should be equitably estopped from asserting that statute as a defense. The trial court rejected this argument based on section 366.2, subdivision (a)(2) that states, "The limitations period provided in this section for the commencement of an action is not tolled or extended for any reason." Appellant now claims the court incorrectly concluded the quoted language prevented it from applying the principles of equitable estoppel. We agree.

Before an estoppel to assert an applicable statute of limitations may be said to exist, certain conditions must be present: the party to be estopped must be apprised of the true state of facts; the other party must be ignorant of the true state of facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and the other party must rely on the conduct to its prejudice. All those factors appear to be present here.

While section 366.2 clearly states that the one-year statute of limitations may not be "tolled" or "extended," it says nothing about equitable estoppel. The doctrines are distinct. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the statute of limitations itself. Equitable estoppel, however, is a different matter. It is not

concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be stopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it may apply no matter how unequivocally the applicable limitations period is expressed.

While section 366.2 subdivision (a)(2) clearly shows the Legislature intended that the statute of limitations set forth therein not be "tolled" or "extended," the statute says nothing about equitable estoppel. The Legislature could have easily stated it intended to abrogate long-established equitable principles. It did not do so. In the absence of such language, or legislative history suggesting that was what the Legislature intended, we conclude the doctrine still applies.

Having reached that conclusion, we agree appellant has alleged sufficient facts to come within the doctrine. Appellant claims that during the settlement negotiations which followed his father's death, Ellen convinced him not to file a timely suit by telling him that he would receive the vineyard. By the time appellant learned Ellen's promise was false, the statute of limitations had passed. We conclude these allegations were sufficient to support a claim of equitable estoppel.

The judgment is reversed.

THURSDAY MORNING FEBRUARY 28, 2008

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

In 2001, Wilma, an elderly widow with full mental capacity, put \$1,000,000 into a trust (Trust). The Trust instrument named Wilma's church (Church) as the beneficiary. Although the Trust instrument did not name a trustee, its terms recited that the trustee has broad powers of administration for the benefit of the beneficiary.

In 2002, Wilma's sister, Sis, began paying a great deal of attention to Wilma, preventing any other friends or relatives from visiting Wilma. In 2003, Wilma reluctantly executed a properly witnessed will leaving her entire estate to Sis. Following the execution of the will, Wilma and Sis began to develop a genuine fondness for each other, engaging in social events frequently and becoming close friends. In 2005 Wilma wrote a note to herself: "Am glad Sis will benefit from my estate."

In 2007, Wilma named Sis as trustee of the Trust, which was when Sis found out for the first time about the \$1,000,000 in the Trust. Without telling Wilma, Sis wrote across the Trust instrument, "This Trust is revoked," signing her name as trustee.

Shortly thereafter, Wilma died, survived by her daughter, Dora, who had not spoken to Wilma for twenty years, and by Sis.

Church claims that the Trust is valid and remains in effect. Sis and Dora each claim that each is entitled to Wilma's entire estate.

- 1. What arguments should Church make in support of its claim, and what is the likely result? Discuss.
- 2. What arguments should Sis and Dora make in support of their respective claims, and what is the likely result? Discuss.

Answer question number 2 according to California law.

Question 5

Harvey and Fiona, both residents of State X, married in 1995. Harvey abandoned Fiona after two months. Harvey then met Wendy, who was also a State X resident. He told her that he was single, and they married in State X in 1997. They orally agreed that they would live on Harvey's salary and that Wendy's salary would be saved for emergencies. They opened a checking account in both their names, into which Harvey's salary checks were deposited. Wendy opened a savings account in her name alone, into which she deposited her salary.

Harvey and Wendy moved to California in 1998. Other than closing out their State X checking account and opening a new checking account in both their names in a California bank, they maintained their original financial arrangement. In February 1999, Harvey inherited \$25,000 and deposited the money into a California savings account in his name alone.

In 2004, Wendy was struck and injured by an automobile driven by Dan. Harvey and Wendy had no medical insurance. Wendy's medical bills totaled \$15,000, which Harvey paid from the savings account containing his inheritance. In 2005, Wendy settled with Dan's insurance carrier for \$50,000, which she deposited into the savings account that she still maintained in State X.

Very recently, Harvey learned that Fiona had died in 2006. He then told Wendy that he and Fiona had never been divorced. Wendy immediately left Harvey and moved back to State X. The savings account in State X currently contains \$100,000. Under the laws of both State X and California, the marriage of Harvey and Wendy was and remained void.

- 1. What are Harvey's and Wendy's respective rights in:
 - a) The State X savings account? Discuss.
 - b) The California checking account? Discuss.
 - c) The California savings account? Discuss.
- 2. Is Harvey entitled to reimbursement for the \$15,000 that he paid for Wendy's medical expenses? Discuss.

Answer according to California law.

Question 6

Albert, an attorney, and Barry, a librarian, decided to incorporate a business to provide legal services for lawyers. Barry planned to perform legal research and draft legal memoranda. Albert intended to utilize Barry's work after reviewing it to make court appearances and argue motions on behalf of other attorneys. Albert and Barry employed Carla, an attorney, to prepare and file all of the documentation necessary to incorporate the business, Lawco, Inc. ("Lawco").

Carla properly drafted all required documentation to incorporate Lawco under the state's general corporation law. The documentation provided that: Lawco shares are divided equally between Albert and Barry; Lawco profits will be distributed equally to Albert and Barry as annual corporate dividends; Barry is president and Albert is secretary.

Albert and Barry opened their business in January, believing that Lawco was properly incorporated. In February, they purchased computer equipment in Lawco's name from ComputerWorks. The computer equipment was delivered to Lawco's office and used by Barry.

Carla, however, neglected to file the articles of incorporation until late April.

In May, Albert, without consulting anyone, contracted in Lawco's name to purchase office furniture for Lawco from Furniture Mart. On the same day, also without consulting anyone, Barry contracted in Lawco's name to purchase telephones for Lawco from Telco.

- 1. Is Lawco bound by the contracts with:
 - a. ComputerWorks? Discuss.
 - b. Furniture Mart? Discuss.
 - c. Telco? Discuss.
- 2. Has Albert committed any ethical violation? Discuss.

Answer question number 2 according to California and ABA authorities.

THURSDAY AFTERNOON FEBRUARY 28, 2008

PERFORMANCE TEST B

INSTRUCTIONS AND FILE

SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

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SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

INSTRUCTIONS

- 1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
- 2. The problem is set in the fictional State of Columbia, one of the United States.
- 3. You will have two sets of materials with which to work: a File and a Library.
- 6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
- 5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
- 6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
- 7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
- 8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

POLACEK & SCHEIER 5700 North Prospect, Suite 2600 Springville, Columbia

MEMORANDUM

To: Applicant

From: R. J. Morrison

Re: Snyder v. Regents of the University of Columbia

Date: February 28, 2008

We have been retained by Dr. Norm Snyder to represent him in claims arising from his removal as Chairperson of the Department of Medicine at the University of Columbia. The Regents of the University terminated him as head of the Department following his very vocal and public opposition to the relocation of the Medical School from its current location here in Springville to Palatine, some 20 miles away. The termination is to become effective almost a month from today. He will retain his professorship after his termination as Chair.

Dr. Snyder wishes to pursue injunctive relief to stop his termination, if possible. Please write me an objective memorandum in which you analyze the likelihood of obtaining a preliminary injunction based on retaliatory employer action in violation of Dr. Snyder's First Amendment right to free speech under the State of Columbia Constitution. For tactical reasons, we are going to rely on the Columbia State Constitution rather than the United States Constitution. We will do so because the Columbia State Constitution is more protective of public employee First Amendment rights. Since the facts will be woven throughout your memorandum, limit your statement of facts to a brief one-paragraph summary.

SPRINGVILLE STAR BULLETIN February 12, 2008

PROFESSOR'S LETTER SPARKS OUTCRY: REGENTS SCHEDULE HEARING

A "letter to the editor" to the *Star Bulletin* on December 28, 2007 by a University of Columbia department chair complaining about plans to relocate the School of Medicine has erupted into a public protest and the scheduling of a special hearing by the Board of Regents. The letter of Dr. Norm Snyder, longtime chair of the Department of Medicine of UC's Medical School, called the Regents' expected approval of the move to Palatine, 20 miles from its present Springville location, "ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens." Snyder also urged *Star Bulletin* readers to refer to the report he submitted to the medical school dean and the Regents and posted on his UC website (http://www.ucolum.hsc.medschool.edu/snyder).

Community activists have used Dr. Snyder's letter to rally people, particularly those in the Homewood area, to attend the Regents' hearing on February 26, 2008 and to speak against moving the school. Mary Rankin, president of the Homewood Citizens' Association, said, "Many of Springville's most vulnerable residents are totally dependent on the Med School for virtually all of their health care needs." Ms. Rankin pointed specifically to emergency room services available through the School of Medicine. Rankin also added, "The School's specialized clinics and research studies provide a broad range of medical services that will disappear." Rankin went on to note that there is "no public transportation between Springville and Palatine."

The Regents are expected to make a decision after the close of public testimony.

EXCERPT FROM DR. NORM SNYDER'S WEBSITE

Background information:

The University of Columbia is a public university comprising four campuses, one of which is the Health Sciences Center. In turn, the Health Sciences Center embraces five schools, one of which is the School of Medicine. The School of Medicine consists of eight Basic Science Departments and sixteen Clinical Departments, including the Department of Medicine.

Dr. Snyder, a nephrologist and medical academician, was appointed Professor of Medicine in the School of Medicine on or about July 1, 1982. He received continuous tenure and was subsequently appointed Head of the Renal Division of the Department of Medicine. In 1986, the doctor was appointed Chair of the Department of Medicine, the largest department within the School of Medicine. Department Chairs are responsible for the organization of their department and for implementing policies initiated by the Chancellor and Dean of their respective units. Dr. Jack Blake became Chancellor of the Health Sciences Center in 1995 and Dr. Paul Simmons has served as Dean of the School of Medicine since 1999.

In early 2004, the University began considering the possibility of moving the School of Medicine, located at Ninth Avenue and Prince Boulevard in Springville, Columbia, to a campus to be established at the former Palatine Army Medical Center in Palatine, Columbia, some 20 miles away. The University engaged in a three-plus year planning process to consider the pros and cons of the relocation plan. The possibility of the transition of the School of Medicine from its Ninth Avenue location to Palatine has been the subject of extensive debate within the University community.

EXCERPTS OF TRANSCRIPT OF INTERVIEW WITH DR. NORM SNYDER

R. J. Morrison: Dr. Snyder, I've just turned on the tape recorder. As I explained earlier, this will mean that others and I can easily review this interview.

Dr. Norm Snyder: Makes sense. That's fine with me.

Q: Dr. Snyder, you showed me the letter dated yesterday terminating you from your position as Chair of the Department of Medicine at the University of Columbia. You wanted to meet today to explore the possibility of seeking injunctive relief -- a preliminary injunction -- stopping that action from taking effect.

A: You know, I was and still am extremely angry about this letter. I have spent the last 20 plus years of my career building up this department into one of the best in the country. I have always prided myself in taking principled positions and speaking my mind on controversial issues. Here's a recent article on the controversy.

Q: Thanks. Doctor, can you tell me more about concerns you have about the proposed relocation of the School of Medicine to Palatine?

A: Of course. First, the University is the primary public research facility in basic science and medicine in Columbia. I feel that separating the School of Medicine from the Basic Sciences Research facilities at Springville would unnecessarily isolate the Med School from its Basic Science colleagues. Second, from a fiscal standpoint, the citizens of Columbia would not be getting their money's worth. The bonds floated to pay for the construction will take 40 years to pay off without a certain benefit to the community. This is particularly true because the new school would be located some 20 miles from the urban center of Springville. That would mean that most people who use the medical facilities would have to travel longer distances to areas not supported by public transportation. This would have a detrimental effect on the lower income members of our community. Finally, I thought I had a good compromise proposal – essentially splitting the medical school into two – with some faculty and facilities being located in Springville and some in Palatine.

Q: And I assume you made these views known?

A: You bet. I wrote a pretty comprehensive report that I circulated widely among the faculty at the Medical School soon after the proposal was first floated in 2004. There were a number of faculty and university-wide forums held in 2004 and 2005. I attended them, and presented my position at each of those forums. In early 2006, Blake and Simmons asked me to meet with them.

Q: Who are they again?

A: Jack Blake is the Chancellor of the Health Sciences Center. Paul Simmons is the Dean of the Medical School. They asked me to tone down my criticism of the relocation proposal, stating that it was divisive. I told them that I thought this issue needed to be fully debated so that a decision in the Medical School's and greater community's best interests would be made. I also told them that if their position eventually prevailed, I would accede, but that I wouldn't go down without a fight.

Q: How did they respond?

A: They seemed to be pretty upset. They said that it was important that the administration present a united front, and that my actions indicated my unwillingness to be a team player.

Q: Dr. Snyder, how would you respond to that statement?

A: I question both the premise and the conclusion they drew about me. I certainly understand that it's important that once a policy is adopted or a decision is made that it is critical that members of the administration implement that policy or decision whether they agree with it or not. Then it's important to present a united front. But the Regents hadn't made a decision yet. We were debating the issue as a community. I have been on the losing side of many such battles over the years, and I defy anyone to point to an instance when I wasn't a good team player. This reminds me of a similar battle over the reorganization of the Health Sciences Center a number of years ago. I opposed the current division of the various schools and made my views known. When the decision went against me, I implemented the decision wholeheartedly.

Q: How closely do you, Blake and Simmons work?

A: The departments are pretty autonomous. Simmons has bimonthly meetings with Department Chairs. Chancellor Blake and I see each other very infrequently. So, we don't work very closely together at all.

Q: Did they direct you not to make any further statements about the relocation?

A: No, they knew better than that. Not that I would have listened anyway.

Q: Can you say more about what you mean?

A: I'm a stubborn cuss, I guess you could say. I felt very strongly – still do – that the relocation plan was misguided, and I felt that I owed it to the Med School, to all my colleagues, and to Springville, to do my best to convince the Regents that I was right. I wanted to make sure the right thing was done.

Q: Did anything happen after the meeting with Blake and Simmons?

A: The next thing that happened was the Regents' meeting where the proposal was considered. That happened about two months ago. I presented my report and oral testimony, as well as a petition signed by some 45 out of 50 of my faculty colleagues at the Medical School opposing the relocation. The Regents tabled their decision for a couple of months. I then wrote a letter to the *Star Bulletin*. That ran in the paper about 7 weeks ago, about a week after the Regents' meeting where I testified. That's the straw that broke the camel's back, I guess.

Q: How so?

A: Earlier this week at the Regents' most recent meeting, lots of community members showed up to testify against the proposal. I'm pretty sure that my letter was the impetus for all the community opposition. The meeting was supposed to last for 4 hours, and ended up going an extra 3 hours.

Q: Did the Regents vote?

A: Yes, they did. Even after all that, they decided to go ahead with the proposal to relocate the Med School to Palatine. I was very disappointed to say the least.

Q: I'm sure you were. And that wasn't the last of it, was it?

A: No, the next thing I know I get this letter dated the day after the Regents' vote. They canned me! I still can't believe it. I just hope there's something you can do about this.

Q: I certainly hope so. We'll start doing research and will draft preliminary injunction papers if we think we have a shot. You've given me a copy of the newspaper article and the termination letter. Did you bring anything else?

A: Yes, here's the letter to the newspaper and a print-out of background information from my website, too. I can't think of anything else that's relevant.

Q: I want to get back to an earlier point you made. You said that you are pretty angry about the proposed termination. Would you say more about the effect of this on you?

A: It's quite a slap in the face. This feels like a blatant attempt to send a stern message to the rest of the faculty: dissent at your peril; don't buck the administration if it's already made up its mind. It feels unfair too, since I told everyone all along that I'd abide by the Regents' decision – whether my position prevailed or not.

Q: Can you say anything about the effect the termination might have on your career?

A: It's absolutely devastating on a professional level, too. I am in the midst of very delicate licensing negotiations with a pharmaceutical company. Everyone will know about my change in position here at the University – and that will likely cause the company to back away from the negotiations. A huge part of my leverage in these negotiations comes from my authority as Department Chair to assign research funds, graduate assistants and lab space to particular research and development teams. This authority will be stripped from me as soon as I'm removed as Chair. We're talking millions of dollars here. Not to mention years of work will go down the tubes. It will be virtually impossible to continue the research, conduct the clinical trials, and do the marketing without the licensing deal. And it's unlikely that another company will step forward at this point.

Q: What kind of research is this?

A: My team is developing a new method of dialysis that is much faster and can be done at home.

Q: That sounds exciting. I would think that it would be in the University's interest to preserve the team as you've set it up, wouldn't it?

A: These pharmaceutical companies are pretty sensitive about these issues. I'm afraid that my removal will be sufficient to cause them to back away regardless of any assurances anyone might give them.

Q: How do you think that will affect you personally?

A: Well, first it will certainly affect my professional prestige and over time that will affect future opportunities for research, research grants, publication opportunities, and future royalties from licenses. It will even limit speaking engagements and conferences.

Q: Can you put a dollar value on that?

A: That would really be problematic, perhaps impossible.

Q: Dr. Snyder, I glanced at the termination letter. What would you say in response to their allegations about disharmony among faculty and staff?

A: When you've been around as long as I have, you make enemies, I'm afraid. Yes, there were some who disagreed with me – mostly because they wanted to be on the opposite side of the issue from me. I think I know which faculty members said they felt intimidated. I don't intimidate people. That's not my style. You will find that I am widely respected by my faculty colleagues and the staff. Those few are just out to get me.

Q: What about that statement about your effectiveness as Chair?

A: It's a bunch of hooey. You can ask the 45 faculty who signed my petition. All of them are in my department, and I'd be willing to bet that all of them would say that things continue to run well.

Q: Well, Dr. Snyder, I know that the termination is set to become effective almost a month from yesterday. I will get back to you by the end of the day and let you know where things stand. Thanks for coming in today.

END OF TRANSCRIPT

LETTER TO THE EDITOR

Springville Star Bulletin

December 28, 2007

Dear Editor:

I write to you as a private citizen who is concerned about the recent direction taken by the Regents of the University of Columbia. I have been a good soldier. I have limited the expression of my concerns to the University community up until this point. I was hopeful that I would be able to persuade the powers that be that the proposal to relocate the Medical School to Palatine is ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens. Unfortunately, this has not been the case. I urge members of the general public to take a look at my report. It can be found at http://www.ucolum.hsc.medschool.edu/snyder. The Regents will be holding a public hearing on February 26, 2008. If you agree with me, come to the hearing and make your views known.

Norm Snyder, M.D. Chairperson, Department of Medicine School of Medicine Health Sciences Center University of Columbia

REGENTS OF THE UNIVERSITY OF COLUMBIA

OFFICE OF THE PRESIDENT WALLACE PLAZA SPRINGVILLE, COLUMBIA

February 27, 2008

Dr. Norm Snyder Chair, Department of Medicine School of Medicine Health Sciences Center University of Columbia FG-705 Springville, Columbia

Dear Dr. Snyder:

After the public portion of last night's Regents' meeting was adjourned, we went into Executive session. At the joint recommendation of Chancellor Blake and Dean Simmons, we unanimously voted to terminate your Chairpersonship of the Department of Medicine, effective one month from today. As a tenured member of the faculty, you will retain all rights and perquisites of your position as a Professor of Medicine, and we sincerely hope that you will remain with the Department.

We greatly regret that the situation has deteriorated to such a degree that this decision is necessary, but it is. Given your more than 20 years of service as Chair of the Department, we believe that you are entitled to understand some of the reasons for this unfortunate decision.

More than three years ago the Regents embarked on the planning process culminating in yesterday's decision to relocate the Medical School to Palatine. Since day one, you have made it your singular mission to sabotage this effort. You are certainly entitled to

your opinion. Let me assure you that the Regents' decision has nothing to do with that

opinion or your wide and vehement expression of that opinion. Rather, it has become

apparent that your prominent role as an outspoken opponent of the relocation has

caused widespread disharmony among the faculty and administration of the University.

Several faculty members have expressed to Chancellor Blake and Dean Simmons that

they feel intimidated by your insistence that the relocation not occur. This indicates that

your performance as department chair has been impaired, as these faculty members

clearly did not feel comfortable going to you directly to express their concerns. Most

importantly, Chancellor Blake and Dean Simmons feel that you cannot be trusted to

work as part of the team to implement the relocation plan, now that it has been

approved.

Norm, you have been an invaluable member of the University community. This action is

not a reflection of any animus toward you. Rather, as your employer, we need to

operate efficiently. Your recent activities have adversely affected your effectiveness as

Chair, undermined the University's confidence in your ability to be a team player, and

caused disharmony among employees. This we cannot tolerate.

All the best,

Regents of the University of Columbia

Lauren D. Ryan

Lauren D. Ryan, President

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THURSDAY AFTERNOON

FEBRUARY 28, 2008

PERFORMANCE TEST B

LIBRARY

SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

LIBRARY

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Elkins v. Hamel

Columbia Supreme Court (2007)

This is an action brought pursuant to Columbia Civil Rights Code § 1983 by two City of Tunbridge police officers against Steve Hamel, the City of Tunbridge police chief, alleging a violation of their First Amendment rights under the Columbia Constitution. In their complaint, plaintiffs Kenneth Elkins and George Chanel assert they have been illegally disciplined by Chief Hamel for exercising their rights to free speech. Plaintiff Elkins asserts he has been disciplined by a fifteen day suspension, and plaintiff Chanel asserts he has been disciplined by a one day suspension. They sought a preliminary injunction. Plaintiffs requested rescission of their suspensions. They further sought injunctive relief restraining and enjoining the defendant from further discipline or threat of discipline for the exercise of their rights to free speech. The request for injunctive relief was denied, and this appeal followed.

The verified complaint sets forth the following facts: On February 16, 2006, Glenda Oliver wrote a column in the *Tunbridge Journal* addressing several issues "concerning her perception of racism in the state court criminal system." The complaint notes: "Ms. Oliver's comments included her questioning the justice involved in the sentencing of a young African-American male on drug charges since no other African-Americans were involved in the young man's sentencing, including the jury, judge and attorneys involved." The column concluded with Ms. Oliver's e-mail address, which was provided for the public to contact her with comments.

On the next day, plaintiff Elkins sent an e-mail from his personal account at his home to several officers of the Tunbridge Police Department (TPD) and the editorial departments of the *Tunbridge Journal* and the *Tunbridge Metro News*. On February 19, 2006, plaintiff Chanel sent an e-mail from his personal account at his residence to Ms. Oliver in response to her column. The complaint states: "Chanel commented that Ms. Oliver's article was racist in tone, and stated his belief that the young man referred to in her

article was not sentenced because of his race." Ms. Oliver responded by e-mail to Chanel's e-mail. Chanel sent this e-mail to Elkins and TPD officer David Ernst. On February 22, 2006 Elkins sent an e-mail from his TPD account at his home to the e-mail accounts of Chanel, Ernst and Ms. Oliver. The complaint states: "The e-mail contained comments in response to Ms. Oliver's article regarding her allegations of racism in the state court system." On February 24, 2006, Elkins' comments that had been sent to the newspapers' editorial boards were published in both papers. On March 13, 2006, Chief Hamel instituted discipline in the form of a one day suspension without pay for Chanel and a fifteen day suspension without pay for Elkins.

We review the decision to deny a motion for a preliminary injunction for abuse of discretion. In order to obtain a preliminary injunction, a party must demonstrate the following: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest.

Substantial Likelihood of Success on the Merits

Plaintiffs are correct that public employees retain their First Amendment rights under the Columbia Constitution. However, in the public employment context, a public employer may impose some restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large. This is particularly true of police officers. Because police departments function as paramilitary organizations charged with maintaining public safety and order, police departments are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.

To determine whether a public employer's actions impermissibly infringe on free speech rights, this court has followed the *Boyer* test enunciated by this Court. The test is as follows: (1) Does the speech in question involve a matter of public concern? If so, (2) we must weigh the employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. If the employee prevails on both these questions, we proceed to the remaining two steps. In step (3), the employee must show the speech was a substantial factor driving the challenged governmental action. If the employee succeeds, in step (4) the employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In evaluating the nature of an employee's speech in a retaliatory discipline or discharge case, we have articulated that when an employee speaks as an employee upon matters only of personal interest the speech is not protected. To judge whether particular speech relates merely to internal workplace issues, courts must conduct a case by case inquiry, looking to the content, form, and context of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance. An employee's speech must not merely relate generally to a subject matter that is of public interest, but must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government. That is, we look beyond the general topic of the speech to evaluate more specifically what was said on the topic.

¹ The language of the Columbia Constitution's First Amendment is identical to that of the U.S. Constitution. Historically, this Court has interpreted these words more expansively than the U.S. Supreme Court. As such, we choose not to follow the recent U.S. Supreme Court opinion in *Garcetti v. Ceballos* (2006).

Because Plaintiffs' letters concerned the integrity of the police department's operations, though arguably touching upon internal workplace issues, the speech addressed matters of public concern. Therefore, Plaintiffs satisfied the first prong of the *Boyer* analysis.

Once a court determines that the Plaintiffs' speech involves a matter of public concern, the *Boyer* balancing test requires a court to weigh the interest of a public employee in commenting on such matters against the interest of the employer in promoting the efficiency of its services. We balance these interests by weighing the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

While possible disruption of the employer's operations does not satisfy the *Boyer* test, the government need not wait for speech actually to disrupt core operations before taking action. The matters noted by the defendant at the hearing, i.e., the disruption of the prosecution of criminal cases and the disruption of personnel matters, were deemed by the trial court to tip the balance in favor of the employer. Thus, Plaintiffs were unable to show a likelihood of success on the merits.

Irreparable Harm

We have held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm. Nevertheless, we also must note that to show irreparable harm, the party seeking injunctive relief must at least demonstrate that there exists some cognizable danger of recurrent violation of its legal

rights. Here, the legal foundation for "irreparable harm" is an underlying violation of the Plaintiffs' constitutional rights. But, it is evident that the trial court was unable to conclude that such violations occurred or were occurring, and found that Plaintiffs did not demonstrate that they would have suffered irreparable harm if injunctive relief was not granted. We agree.

Furthermore, in the employment context, courts are loathe to grant preliminary injunctions because injuries often associated with employment discharge or discipline, such as damage to reputation, financial distress, and difficulty finding other employment, do not constitute irreparable harm. Plaintiffs wrongfully discharged from employment generally may be made whole by monetary damages after a full trial on the merits, such as in this case.

Balancing of harms

The moving party has the burden of showing that the threatened injury to the moving party outweighs the injury to the other party. The standard is easy to understand in common sense terms even if the expression is imperfect: the judge should grant or deny preliminary relief with the possibility in mind that an error might cause irreparable loss to either party. Consequently the judge should attempt to estimate the magnitude of that loss on each side and also the risk of error. That is, in deciding whether to grant or deny a preliminary injunction the court must choose the course of action that will minimize the costs of being mistaken. If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief - whose legal rights have not been violated - the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff. The court

below found the potential harm to the efficient and smooth operation of the police department to outweigh the prospective minimal First Amendment deprivation to be suffered by the plaintiffs. We do not disagree.

Not Adverse to the Public Interest

The moving party must demonstrate that the injunction, if issued, is not adverse to the public interest. This court has recognized that the public has a strong interest in the vindication of an individual's constitutional rights, particularly in encouraging the free flow of information and ideas under the First Amendment. On the other hand, in cases such as this, the public has an interest in the efficient and dependable operation of law enforcement agencies. The court below did not reach this issue. We need not either. In the absence of a showing of substantial likelihood of success on the merits, the court below did not err in denying Plaintiffs' motion for preliminary injunction.

Affirmed.

Harlan v. Yarnell

Columbia Supreme Court (2002)

Defendants, two state university officials, appeal from the superior court's finding of a violation of Plaintiff's First Amendment rights under the Columbia Constitution and awarding him damages. We affirm.

Background

Plaintiff Myron Harlan is a tenured faculty member at Columbia State University ("CSU"). He was appointed as an assistant professor in the Department of Accounting in 1989. His field is taxation. Beginning in 1995, Dr. Harlan sought to revoke the tenure of a colleague (Dr. William Mosser) on grounds of plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and other charges. Administrators at CSU allegedly threatened Dr. Harlan with adverse employment-related actions unless his charges against Dr. Mosser were dropped. These threatened actions included termination of the Masters of Accounting (M.S.) degree program in which Dr. Harlan taught, assignment to teach courses outside his area of expertise, transfer to another department, and eventual termination due to overstaffing if the graduate program were eliminated.

Ultimately, a special university committee recommended that Dr. Mosser's tenure be retained, but it did so without considering evidence beyond the initial charges and without interviewing Dr. Harlan. In July 1996, Dr. Carlson became the Dean of the College of Business, and, after learning of the more than six years of divisiveness and dysfunction within the Department of Accounting, he proposed transferring Dr. Harlan out of the Department. In the summer of 1997, Dr. Harlan was transferred involuntarily from the Department of Accounting into the Department of Management, in which he

claims he is not qualified to teach any courses, thereby resulting in a diminished ability to attract research funds, publish scholarship, receive salary increases, teach summer tax classes, and obtain reimbursement for professional dues and journal subscriptions. As we discuss in depth later, Dr. Harlan aired his professional concerns about being removed from the Department of Accounting to Dean Carlson several times before he was transferred. Dr. Harlan contends that he was notified in May 1998 that he could only teach two classes, both in tax, in the Department of Accounting in any given year. He further contends that adjunct staff and temporary faculty have been hired to teach the courses he normally teaches.

In response to the transfer, Dr. Harlan filed a grievance. Eventually, the Provost denied the grievance.

Dr. Harlan filed suit alleging that his transfer to the Department of Management was in retaliation for his public allegations against Dr. Mosser. He was awarded damages and injunctive relief following a jury trial. This appeal followed.

<u>Discussion</u>

Dr. Harlan's Columbia Constitution First Amendment claim rested on the assertion that state actors may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression and cannot retaliate against an employee for exercising his constitutionally protected right of free speech. In considering this type of claim, it is essential to identify the speech which resulted in the alleged retaliation. Here, Dr. Harlan's "speech" consisted of his statements in support of administrative revocation of tenure of Dr. Mosser and his statements refusing to withdraw his support for an investigation despite the university's opposition.

The four-part test for evaluating a Columbia constitutional claim for First Amendment retaliation is stated in *Boyer*. The test is as follows: (1) whether the speech is protected, i.e., on a matter of public concern; (2) whether the employee's interest in commenting on matters of public concern outweighs the government employer's interest in promoting efficient government services. If the employee prevails on both these questions, step (3) requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. If the employee so demonstrates, step (4) considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected speech.

The trial court properly found that speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of state officials, in terms of content, clearly concerns matters of public importance. In deciding whether an employee's speech touches on a matter of public concern, or constitutes a personal grievance, courts look at the "content, form and context of a given statement, as revealed by the whole record." Boyer. They also consider the motive of the speaker - was the speech calculated to redress personal grievances or did it have a broader public purpose? Here, Dr. Harlan attempted to bring his concerns about Dr. Mosser to the CSU Administration, and stated in response to threats that if the charges were withdrawn, he would personally refile them. He wrote memos to the Provost about the lack of investigation that generated the recommendation that Dr. Mosser's tenure not be revoked and requested an investigation of the alleged threats made against him. The speech in this case fairly relates to charges at a public university that plainly would be of interest to the public, e.g., plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and a claimed inadequate investigation of the allegations and alleged retaliation against the person who made the allegations.

Dean Carlson contended that Dr. Harlan merely sought to establish internal order in the Department of Accounting, not bring to light governmental wrongdoing. Of course, speech relating to an internal department dispute will normally be classified as a personal grievance outside of public concern. Dr. Harlan testified that while he knew that filing tenure revocation charges against Dr. Mosser would be divisive in the short run, in the long run it would lead to greater harmony in the Department because most of the problems were attributable to that issue. The fact that Dr. Harlan might receive an incidental benefit of what he perceived as improved working conditions does not transform his speech into purely personal grievances. Moreover, speech which touches on matters of public concern does not lose protection merely because some personal concerns are included. The trial court properly concluded that Dr. Harlan's speech related to matters of public concern.

As to the second step, the trial court balanced Dr. Harlan's right to speak out about this matter with the interests of his employer. In engaging in this balancing, courts consider the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

In weighing factor one, the trial court found that Dr. Harlan's speech contributed to disharmony among coworkers. Its inquiry properly did not stop there. In a democratic society, healthy levels of dissent and debate are essential to the vitality of institutions. In particular, an academic institution strives to foster critical thinking skills in its students and does so in part by modeling the give and take of debate within the institution itself. Thus, the court must consider the ability of the employer to do its essential work without undue disruption in its operations despite the exercise of free speech rights of its

employees. Defendants were unable to convince the court that the disharmony caused disruption in teaching, research or administration at the school, nor were Defendants able to demonstrate long-term morale or discipline problems caused by the speech.

The second factor goes to the essence of the specific employer-employee relationship in question. For example, an executive depends upon the loyalty and confidence of her administrative assistant. Similarly, a political appointee must rely upon the loyalty of her aides. The trial court found here that the nature of the relationship between a professor in a department and his superiors did not necessitate loyalty and confidence.

The third factor speaks for itself. Here, the court found that Dr. Harlan's speech had no effect on his ability to perform his duties as a professor. He continued to teach classes, hold office hours, serve on faculty committees, and participate in outside activities such as conferences and symposia.

The court also considered the time, place and manner of Dr. Harlan's speech. It is noteworthy that Dr. Harlan's speech occurred through proper channels. He filed charges according to university protocols. He spoke with colleagues privately and in faculty or committee meetings. He aired his concerns directly with the Dean of the College. He then filed a grievance. This is not to say that more public forums for expression of opinions are never appropriate, but Dr. Harlan followed authorized procedures and appealed to appropriate authorities.

The next factor considers whether the matter was one on which debate was vital to informed decision-making. The allegations addressed a matter of public concern, not mere public interest, because they involve charges of wrongdoing and malfeasance. Thus, debate was essential to potentially avoid the alleged ongoing wrongdoing.

The third step of the *Boyer* test requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. There is no question here that the employer's motivation for transferring Dr. Harlan was his speech.

The fourth step considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected speech. Dean Carlson testified that "every expression of the reason for Dean Carlson's transfer of Dr. Harlan in August 1997 involved an attempt to resolve once and for all six years of divisiveness and dysfunction within the Department." We recognize that Dean Carlson testified that there were a variety of reasons (other than the content of Dr. Harlan's protected speech) for the transfer: (1) getting the Department of Accounting back on track after 8 to 9 years of divisiveness between the Accounting faculty and the Tax and Law faculty, (2) getting the Department to focus on the upcoming 150-hour requirement for accounting professionals, (3) increasing the productivity of the non-tenured faculty, and (4) finding a suitable fit between Dr. Harlan's non-accounting and interdisciplinary Ph.D. and the Department of Management. In examining the record before us, however, we are not persuaded that the court erred in finding that CSU would not have transferred Dr. Harlan in the absence of his speech.

Affirmed.